

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

LYNN RAY GRIM,

Petitioner,

vs.

JACK PALMER, *et al.*,

Respondents.

3:06-cv-00622-RCJ-VPC

ORDER

This action is a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, filed by a Nevada prisoner represented by counsel. This action comes before the Court on the merits of the amended petition.

I. Background

On December 6, 2002, petitioner pled guilty to sexual assault on a child. (Exhibit 25).¹ On June 20, 2003, petitioner was sentenced to life in prison with the possibility of parole after 20 years. (Exhibit 26). Judgment was entered on February 13, 2003. (Exhibit 27). Petitioner appealed the judgment. (Exhibit 33). On June 4, 2004, the Nevada Supreme Court affirmed the district court's judgment. (Exhibit 39).

Petitioner filed a habeas petition and a supplement to the petition, in state district court on November 30, 2004. (Exhibits 44 and 51). On November 28, 2005, the district court denied the habeas

¹ The exhibits referenced in this order are found in the Court's record at Docket #15-17.

1 petition. (Exhibit 52). Petitioner appealed from the denial of his petition. (Exhibit 54). On October
 2 10, 2006, the Nevada Supreme Court affirmed the district court's denial of the state habeas petition.
 3 (Exhibit 58).

4 This Court received petitioner's *pro se* federal habeas petition on November 13, 2006. (Docket
 5 #1). By order filed February 1, 2007, the Court appointed counsel for petitioner and directed the filing
 6 of an amended petition by newly-appointed counsel. (Docket #8). On July 24, 2007, through counsel,
 7 petitioner filed an amended petition. (Docket #14). An answer was filed on December 21, 2007.
 8 (Docket #25). Petitioner's reply was filed June 19, 2008. (Docket #30).

9 **II. Federal Habeas Corpus Standards**

10 The Antiterrorism and Effective Death Penalty Act ("AEDPA"), at 28 U.S.C. § 2254(d), provides
 11 the legal standard for the Court's consideration of this habeas petition:

12 An application for a writ of habeas corpus on behalf of a person
 13 in custody pursuant to the judgment of a State court shall not be granted
 14 with respect to any claim that was adjudicated on the merits in State court
 15 proceedings unless the adjudication of the claim –

16 (1) resulted in a decision that was contrary to, or involved an
 17 unreasonable application of, clearly established Federal law, as
 18 determined by the Supreme Court of the United States; or

19 (2) resulted in a decision that was based on an unreasonable
 20 determination of the facts in light of the evidence presented in the State
 21 court proceeding.

22 The AEDPA "modified a federal habeas court's role in reviewing state prisoner applications in
 23 order to prevent federal habeas 'retrials' and to ensure that state-court convictions are given effect to the
 24 extent possible under law." *Bell v. Cone*, 535 U.S. 685, 693-694 (2002). A state court decision is
 25 contrary to clearly established Supreme Court precedent, within the meaning of 28 U.S.C. § 2254, "if
 26 the state court applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases"
 or "if the state court confronts a set of facts that are materially indistinguishable from a decision of [the
 Supreme Court] and nevertheless arrives at a result different from [the Supreme Court's] precedent."

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1 *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003) (quoting *Williams v. Taylor*, 529 U.S. 362, 405-406 (2000)
 2 and citing *Bell v. Cone*, 535 U.S. 685, 694 (2002)).

3 A state court decision is an unreasonable application of clearly established Supreme Court
 4 precedent, within the meaning of 28 U.S.C. § 2254(d), “if the state court identifies the correct governing
 5 legal principle from [the Supreme Court’s] decisions but unreasonably applies that principle to the facts
 6 of the prisoner’s case.” *Lockyer v. Andrade*, 538 U.S. at 75 (quoting *Williams*, 529 U.S. at 413). The
 7 “unreasonable application” clause requires the state court decision to be more than merely incorrect or
 8 erroneous; the state court’s application of clearly established federal law must be objectively
 9 unreasonable. *Id.* (quoting *Williams*, 529 U.S. at 409).

10 In determining whether a state court decision is contrary to, or an unreasonable application of
 11 federal law, this Court looks to the state courts’ last reasoned decision. *See Ylst v.*
 12 *Nunnemaker*, 501 U.S. 797, 803-04 (1991); *Shackleford v. Hubbard*, 234 F.3d 1072, 1079 n.2 (9th Cir.
 13 2000), *cert. denied*, 534 U.S. 944 (2001). Moreover, “a determination of a factual issue made by a State
 14 court shall be presumed to be correct,” and the petitioner “shall have the burden of rebutting the
 15 presumption of correctness by clear and convincing evidence.” 28 U.S.C. § 2254(c)(1).

16 **III. Discussion**

17 **A. Grounds One and Two**

18 Ground One of the amended petition alleges the following: “The police used coercive tactics to
 19 obtain Grim’s incriminating statements and failed to advise him of his Miranda rights in violation of his
 20 Fifth, Sixth, and Fourteenth Amendment rights guaranteed by the United States Constitution.”
 21 (Amended Petition, at p. 8).

22 Ground Two of the amended petition alleges the following: “The trial court abused its discretion
 23 in refusing to grant Grim’s request for a short continuance to allow his newly retained counsel to prepare
 24 his prepare his case and to obtain a material defense witness. The trial court’s denial of the request
 25 deprived Grim of his right to counsel pursuant to the Fifth, Sixth, and Fourteenth Amendments to the
 26 United States Constitution.” (Amended Petition, at p. 11).

1 In *Tollett v. Henderson*, the United States Supreme Court held that:

2 [A] guilty plea represents a break in the chain of events which has preceded it in
3 the criminal process. When a criminal defendant has solemnly admitted in open
4 court that he is in fact guilty of the offense with which he is charged, he may not
thereafter raise independent claims relating to the deprivation of constitutional
rights that occurred prior to the entry of the plea.

5 *Tollett v. Henderson*, 411 U.S. 258, 267 (1973). The Nevada Supreme Court rejected petitioner's claims
6 that the trial court erred by denying appellant's motion to suppress statements made to the police and
7 that the trial court erred by denying a continuance. (Exhibit 39, at p. 1). The basis of rejecting these
8 claims was as follows:

9 This court has stated that an appellant may not raise challenges to events
10 that preceded a guilty plea: "[A] guilty plea represents a break in the
11 chain of events which has preceded it in the criminal process . . . [A
12 defendant] may not thereafter raise independent claims relating to the
deprivation of constitutional rights that occurred prior to the entry of the
guilty plea." (Footnote 1: *Webb v. State*, 91 Nev. 469, 470, 538 P.2d 164,
165 (1975) (quoting *Tollett v. Henderson*, 411 U.S. 258, 267 (1973)).

13 (Exhibit 39, at pp. 1-2). Under *Tollett*, petitioner cannot raise Grounds One and Two of the amended
14 petition, which are independent constitutional claims of events that occurred prior to entry of the guilty
15 plea. Petitioner has failed to meet his burden of proving that the state court's ruling was contrary to, or
16 involved an unreasonable application of, clearly established federal law, as determined by the United
17 States Supreme Court, or that the ruling was based on an unreasonable determination of the facts in light
18 of the evidence presented in the state court proceeding. This Court will deny habeas relief as to Ground
19 One and Ground Two.

20 **C. Ground Three**

21 Ground Three of the amended petition alleges ineffective assistance of counsel, with three sub-
22 claims. (Amended Petition, at p. 13).

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1 **1. Ground 3(a)**

2 “Trial counsel failed to request an additional psychological evaluation of Grim for the purpose
3 of determining his competency to freely, intelligently and voluntarily give a statement to the police.”
4 (Amended Petition, at p. 13). As to this claim, the Nevada Supreme Court ruled:

5 First, appellant claimed counsel was ineffective for failing to request
6 psychological evaluations of the victim and her family, as well as an
7 additional psychological evaluation of appellant. Appellant failed to
8 demonstrate counsel’s performance was deficient or prejudiced him.
9 Appellant failed to demonstrate that such requests would have been
successful. Appellant also failed to state what evidence would have been
produced by psychological evaluations that would have prevented him
from pleading guilty. Accordingly, we conclude that the district court did
not err in denying the claim.

10 (Exhibit 58, at pp. 2-3) (footnotes omitted). The Nevada Supreme Court used the correct legal standard,
11 *Strickland v. Washington*, 466 U.S. 668 (1984), in analyzing petitioner’s ineffective assistance of
12 counsel claims.

13 The factual findings of the state court are presumed correct. 28 U.S.C. § 2254(e)(1). Petitioner has
14 failed to meet his burden of proving that the state court’s ruling was contrary to, or involved an
15 unreasonable application of, clearly established federal law, as determined by the United States Supreme
16 Court, or that the ruling was based on an unreasonable determination of the facts in light of the evidence
17 presented in the state court proceeding. This Court will deny habeas relief as to Ground 3(a).

18 **2. Ground 3(b)**

19 “Counsel misrepresented the number of years Grim would serve should he enter a plea of guilty
20 to the charges, rendering the plea involuntary.” (Amended Petition, at p. 14). The Nevada Supreme
21 Court ruled on the merits of this claim as follows:

22 Third, appellant claimed counsel was ineffective for inducing his guilty
23 plea by promising him he would serve only seven years. This claim is
24 belied by the record. At the plea canvass, appellant stated he had not
been promised any particular sentence and understood the sentence was
up to the district court. Accordingly, we conclude the district court did
not err in denying this claim.

25 (Exhibit 58, at pp. 3-4) (footnotes omitted). The factual findings of the state court are presumed correct.
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1 28 U.S.C. § 2254(e)(1). Petitioner has failed to meet his burden of proving that the state court's ruling
2 was contrary to, or involved an unreasonable application of, clearly established federal law, as
3 determined by the United States Supreme Court, or that the ruling was based on an unreasonable
4 determination of the facts in light of the evidence presented in the state court proceeding. This Court
5 will deny habeas relief as to Ground 3(b).

6 **3. Ground 3(c)**

7 "Counsel erroneously advised Grim to plea to sexual assault in exchange for the state's
8 agreement to dismiss the count of lewdness when Grim could not be convicted of both lewdness and
9 sexual assault because those charges merged." (Amended Petition, at p. 14). As to this claim, the
10 Nevada Supreme Court ruled:

11 Eighth, appellant claimed counsel was ineffective for advising him to
12 plead guilty to sexual assault in exchange for the State's agreement to
13 dismiss a count of lewdness with a child under the age of fourteen.
14 Specifically, appellant claimed that the two counts were redundant and
15 would have merged. Lewdness and sexual assault are redundant only
16 when they are part of the same act. Our review of the record on appeal
reveals that the charges did not encompass the same act, but involved
separate and distinct allegations relating to appellant's actions.
Accordingly, we conclude that the district court did not err in denying this
claim.

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18 Appellant further claimed that his guilty plea was not knowingly and
19 voluntarily entered. A plea is presumptively valid, and the petitioner
20 carries the burden of establishing that the plea was not entered knowing
21 and intelligently. Further, this court will not reverse a district court's
determination concerning the validity of a plea absent a clear abuse of
discretion. In determining the validity of a guilty plea, this court looks to
the totality of the circumstances.

22 Appellant claims his guilty plea was invalid due to his counsel's
23 ineffectiveness. As stated above, counsel was not ineffective. Appellant
24 also claimed he cannot read and did not understand that he would serve
at least twenty years in prison. These claims are belied by the record. At
the sentencing hearing, appellant affirmed that he had read and signed a
guilty plea memorandum and had not promised any particular sentence.
25 The guilty plea memorandum appellant signed and the district court's
statements at the plea canvass together sufficiently advised appellant that
26 he would spend at least 20 years to life in prison and that he would be
potentially subject to restriction for the rest of his life.

1 (Exhibit 58, at pp. 5-7) (footnotes omitted). The factual findings of the state court are presumed correct.
2 28 U.S.C. § 2254(c)(1). Petitioner has failed to meet his burden of proving that the state court's ruling
3 was contrary to, or involved an unreasonable application of, clearly established federal law, as
4 determined by the United States Supreme Court, or that the ruling was based on an unreasonable
5 determination of the facts in light of the evidence presented in the state court proceeding. This Court
6 will deny habeas relief as to Ground 3(c).

7 **IV. Certificate of Appealability**

8 In order to proceed with his appeal, petitioner must receive a certificate of appealability. 28
9 U.S.C. § 2253(c)(1); Fed. R. App. P. 22; 9th Cir. R. 22-1; *Allen v. Ornoski*, 435 F.3d 946, 950-951 (9th
10 Cir. 2006); *see also United States v. Mikels*, 236 F.3d 550, 551-52 (9th Cir. 2001). Generally, a
11 petitioner must make "a substantial showing of the denial of a constitutional right" to warrant a
12 certificate of appealability. *Id.*; 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000).
13 "The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the
14 constitutional claims debatable or wrong." *Id.* (quoting *Slack*, 529 U.S. at 484). In order to meet this
15 threshold inquiry, the petitioner has the burden of demonstrating that the issues are debatable among
16 jurists of reason; that a court could resolve the issues differently; or that the questions are adequate to
17 deserve encouragement to proceed further. *Id.*

18 Pursuant to the December 1, 2009 amendment to Rule 11 of the Rules Governing Section 2254
19 and 2255 Cases, district courts are required to rule on the certificate of appealability in the order
20 disposing of a proceeding adversely to the petitioner or movant, rather than waiting for a notice of appeal
21 and request for certificate of appealability to be filed. Rule 11(a). This Court has considered the issues
22 raised by petitioner, with respect to whether they satisfy the standard for issuance of a certificate of
23 appealability, and determines that none meet that standard. The Court will therefore deny petitioner a
24 certificate of appealability.

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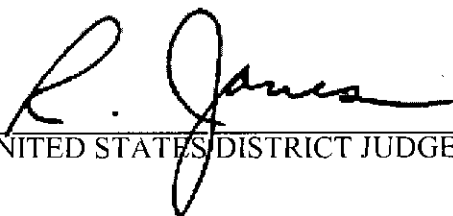
1 **V. Conclusion**

2 **IT IS THEREFORE ORDERED** that the amended petition for a writ of habeas corpus is
3 **DENIED IN ITS ENTIRETY.**

4 **IT IS FURTHER ORDERED** that petitioner is **DENIED A CERTIFICATE OF**
5 **APPEALABILITY.**

6 **IT IS FURTHER ORDERED** that the Clerk **SHALL ENTER JUDGMENT**
7 **ACCORDINGLY.**

8 Dated this 4th day of March, 2010.

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10 UNITED STATES DISTRICT JUDGE
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